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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DIMONE WILEY et al, Defendants and Appellants.	E035015 (Super.Ct.No. FSB038848) OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur A. Harrison, Judge. Affirmed as to defendant Alvin Lamont Lewis; reversed as to defendant Dimone Wiley.

Jeffrey J. Stuetz, under appointment by the Court of Appeal, for Defendant and Appellant Dimone Wiley.

Koryn & Koryn and Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant Alvin Lamont Robert Lewis.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Marilyn L. George and Janelle Boustany, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants Alvin Lamont Lewis and Dimone Wiley appeal from their convictions of robbery and related enhancements. Lewis contends that (1) the prosecutor committed misconduct during closing argument by shifting the burden of proof to defendants to prove their innocence; and (2) his sentence of 40 years to life constitutes cruel and unusual punishment under the federal and state Constitutions. We find no error with respect to Lewis, and we affirm.

Wiley contends that (1) he received ineffective assistance of counsel when his trial counsel failed to move to suppress his confession; and (2) the armed enhancement must be reversed for insufficiency of the evidence. We find that defendant received ineffective assistance of counsel, and we therefore reverse his conviction.

II. FACTS AND PROCEDURAL BACKGROUND

In the afternoon of April 2, 2003, a man wearing a blue jacket entered an electronics store in San Bernardino and put a pistol to the head of Alfredo Pacheco, a store employee, and told him to get to the ground. The assailant demanded money and took Pacheco's keys and cell phone. Another man entered and kicked Pacheco in the head and told him not to move. Pacheco could not identify any of the robbers; he did not know how many robbers had entered the store.

Another store employee, Ismael Resendez, was outside the store installing stereo equipment in a car when he saw four young men approach the store. Resendez told his friend, Joey Sanchez, to go into the store because the young men appeared to be going in too fast. Sanchez entered the store, and then ran outside, yelling for everyone to run away. One of the robbers pointed a gun at Resendez. Resendez saw the four men running towards a field. Two of the men were carrying pillowcases.

Yvette Chacon was sitting outside the store with two friends when she saw a group of five to eight men walk up and enter the store. She heard someone yell, "Don't move," and a man yelled, "Run." She looked back and saw men with shotguns. Chacon and her friends ran to her car in the parking lot. Chacon saw men run out of the store carrying large white trash bags. The men wore black hooded sweatshirts, and she saw one of them holding a handgun. One of the men had on a wolf mask, and one wore a big Afro wig. She saw four or five men get in a white car across the street and drive away. Three of the men were left behind; those men ran behind the white car with big bags, dropping things as they ran. Chacon followed the white car but eventually lost sight of it. About the time she lost sight of the car, an employee of the electronics store called her on her cell phone, and she described what she had seen. She could not identify any of the suspects.

Police Officer Carlos Quiroz responded to a call about the robbery. When he was driving in the area where the suspects had last been spotted, he saw three men wearing "long-sleeve black T-shirts, black hooded sweatshirts, black jackets." Quiroz testified that their clothing matched the information he had received from dispatch about the robbery suspects. Quiroz identified Lewis and codefendant Maurice Gibson as two of the

men he had seen. When Quiroz started to pull his patrol car over towards the curb, the three men started running. The men jumped over fences and ended up in the backyard of a residence on Blackstone Street. Quiroz was stopped from entering the yard by five or six pit bull dogs, and he lost sight of the men. Quiroz told other officers he had last seen one of the men near a shed with a van parked next to it.

A man came out of the house and gave the officers permission to search the house. Inside, Quiroz saw four men, all of whom were bare-chested. Quiroz saw two pillowcases near the wall; the pillowcases contained stereo equipment. Quiroz also saw a pile of black sweatshirts, T-shirts, and jackets on the living room floor. There was a wolf mask in the kitchen. Quiroz found a loaded shotgun, a loaded .45-caliber handgun, and an unloaded nine-millimeter semiautomatic handgun under the van. Quiroz saw Wiley walk out of one of the bedrooms. Wiley was not one of the three men Quiroz had earlier seen running away. Quiroz testified that he believed Wiley was bare-chested.

Another officer, Gary Schulke, went to the west side of a house at 1515 West Virginia Street, not far from the house where the other suspects were found. He saw a long-sleeved black shirt dropped in the yard, and he found Lewis hiding in a trash can 30 to 40 feet away. Lewis was wearing no shirt, and he had a white undershirt wrapped around his head. When the undershirt was removed, Schulke saw that Lewis wore his hair in a large Afro. Lewis had Pacheco's car keys in his pants pocket. Quiroz identified Lewis as one of the suspects he had pursued earlier.

Another officer found an empty box for stereo equipment in a field south of the store. Lewis's fingerprints were on the box.

In an interview with Detective James Beach, Wiley first stated that he had been at the house where he was arrested to buy pit bulls. He later admitted participating in the robbery. A tape recording of the interview was played for the jury, and a transcript of the interview was provided to the jury.

An information charged defendants as well as William Armstrong, Brian Jones, Maurice Gibson, and Brandon Smith with robbery. Armstrong and Jones entered guilty pleas. Lewis, Wiley, and Gibson were tried together. The jury deadlocked as to Gibson, and a mistrial was declared. The record does not show the disposition of the charges as to Smith.

The jury found Lewis and Wiley guilty of robbery (§ 211) and found true the allegations that Lewis personally used a firearm (§ 12022.5, subd. (a)) and that Wiley knew that a principal was personally armed with a firearm. (§ 12022, subd. (d).) The court found true the allegations that Lewis had two prior strike convictions.

The court sentenced Wiley to prison for two years for the robbery and to a one-year enhancement for being armed with a firearm. After denying Lewis's motion to strike one of his prior strike convictions, the court sentenced him to 40 years to life, comprised of a term of 25 years to life for the robbery, a consecutive 10-year enhancement for principal armed with a firearm, and a consecutive 5-year enhancement for being a repeat serious felony offender.

III. DISCUSSION

A. Lewis's Contentions

1. Prosecutor's Closing Argument

Lewis argues that during closing and rebuttal arguments, the prosecutor improperly shifted the burden to defendants to prove their innocence. Specifically, he challenges the prosecutor's comments that (1) none of the defendants had contested the legality of the search of the house where they were arrested; (2) Wiley did not challenge the legality of his confession, and (3) defendants did not use subpoena powers to call certain witnesses on their behalf.

Prosecutorial misconduct is a ground for reversal only when it is "'reasonably probable that a result more favorable to the defendant would have occurred had the [prosecutor] refrained from [his improper comments]. . . .'" (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) We examine separately each instance of purported misconduct.

a. Comment on Legality of Search

During the prosecutor's initial closing argument, the prosecutor stated: "Now, when you go back in the jury room, I know that there will be a lot of specualation about a lot of facts, and there was discussions about why was he [*sic*] at that house. Whose house was that. Ask yourself, 'Geez, that was a legal search. Did he have a right to go into that house?' I am looking at three defense attorneys, ladies and gentlemen, I can tell you beyond an absolute doubt if that search was illegal, each and every one of the attorneys would have objected; that evidence would have never--" After counsel for Wiley

interposed an objection, the court stated, "Appropriateness of search is a legal issue for the Court to determine, not a function for the jury to be concerned in any manner."

Thus, the court admonished the jury that it was not to concern itself with the legality of the search. We conclude that this admonishment "cured any impropriety or misimpression caused by the alleged misconduct . . . ." (*People v. Turner* (2004) 34 Cal.4th 406, 430.) Moreover, even accepting for purposes of argument that the prosecutor's argument constituted misconduct, Lewis has not explained why the court's admonition failed to cure any potential harm from the prosecutor's statement.

b. Comment on Wiley's Confession

Lewis next argues that the prosecutor committed misconduct in commenting on Wiley's confession. The prosecutor stated, "Now, a point I would like to make about the interview, one, there was discussion about his mother. Again, if there was anything illegal or improperly – according to law – that there was done in that interview, then that interview would not be before you. It's admissible evidence." When counsel for Wiley interposed an objection on the ground that the prosecutor misstated the law, the court responded, "I'll reiterate. The Court rules upon the admissibility of evidence. Jurors are required to consider the evidence that has been submitted to them."

As with the comment on the legality of the search, the court admonished the jury that it was not to concern itself with the admissibility of the confession. We conclude that this admonishment similarly "cured any impropriety or misimpression caused by the alleged misconduct . . . ." (*People v. Turner*, *supra*, 34 Cal.4th at p. 430.) Moreover, even accepting for purposes of argument that the prosecutor's argument constituted

misconduct, Lewis has not explained why the court's admonition failed to cure any potential harm to him from the prosecutor's statement. Finally, when the confession was introduced into evidence, the court admonished the jury that it was applicable only to Wiley and "[was] not to be considered by you as to the other two defendants in this matter."

c. Failure to Use Subpoena Power

Lewis argues that the prosecutor improperly commented on defendants' failure to use the subpoena power to call available witnesses. As background, counsel for Lewis argued to the jury that the People had failed to call all the available eyewitnesses, including Joey Sanchez, as follows: "Also, another witness that was conspicuously not called, Joey, who was in the store. And we know that Joey said, 'Run,' because Joey saw those people. It would have been interesting to hear Joey's description."

In rebuttal argument, after discussing other persons, including Sanchez, who had been at the robbery scene, but who had not been called as witnesses at the trial, the prosecutor stated, "Well, we have people from the crime scene that have talked about this. There may be reasons why they are not present. . . . But again, there's attorneys representing all sides of this case. I happen to be representing – I am the prosecutor. There's subpoena power of every attorney. You can serve a subpoena on – each of the attorneys could subpoena any witness they want, and by court order they would be required to come and testify in this case."

Counsel for Lewis objected on the ground that "[d]efense is not required to present evidence; has no burden of proof." The court responded, "Court will sustain the

objection. There's no burden on anyone but the prosecutor. The comment regarding the subpoena power is a correct one. Each attorney can subpoena witnesses to court."

In *People v. Mendias* (1993) 17 Cal.App.4th 195, 202-203, the defendant's attorney argued that the jury should acquit the defendant of attempted murder because he had acted in a heat of passion and therefore without malice. In rebuttal argument, the prosecutor asked, "'Where are the cousins who were there at the scene? Where is the defendant's girlfriend?'" On appeal from his conviction of assault with a firearm, the defendant argued that the prosecutor's reference to uncalled witnesses was error. (*Id.* at p. 202.) The court disagreed, explaining, "Although a prosecutor may not comment, directly or indirectly, on a defendant's exercise of his privilege not to testify (*Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229]), comment is permitted when a defendant fails 'to call an available witness whose testimony would naturally be expected to be favorable.' [Citations.] [¶] If, as his attorney argued to the jury, appellant had 'snapped' or gone 'nuts' appellant's nephews and girlfriend should have been able to so testify. His failure to call them was properly subject to comment." (*Mendias,* at p. 203, fn. omitted.)

Here, likewise, counsel for Lewis opened the door to the prosecutor's rebuttal argument by arguing that the People had failed to prove their case because they had not called all available witnesses. The prosecutor appropriately responded to that argument by pointing out that defendants had subpoena power available to them and could have called witnesses whose testimony was expected to be favorable. Thus, we find no error in the prosecutor's comment on defendants' ability to subpoena witnesses in response to

defense counsel's argument that a specific witness had not been called. Lewis's argument of prosecutorial misconduct is unmeritorious.

2. Cruel and Unusual Punishment

Lewis contends that his 40-year-to-life sentence constituted cruel and unusual punishment in violation of the federal and state Constitutions.

a. Waiver

The People argue that Lewis's challenge to his sentence on the ground of cruel and unusual punishment has been waived because he did not raise any objection in the trial court. Lewis did move under section 1385 to dismiss one of his strike priors in the interests of justice; the trial court denied the motion, finding that Lewis fit squarely within the philosophy of the "Three Strikes" law. Regardless of whether that motion was sufficient to preserve the specific issue of which Lewis now complains, we will exercise our discretion to address the issue on the merits to forestall any future claim of ineffective assistance of counsel.

b. Federal Constitution

The United States Supreme Court has held that California's Three Strikes law does not violate the Eighth Amendment's prohibition on cruel and unusual punishments (*Lockyer v. Andrade* (2003) 538 U.S. 63, 123 S.Ct. 1166, 1172-1175; *Ewing v. California* (2003) 538 U.S. 11, 123 S.Ct. 1179, 1184-1190). As we discuss below, Lewis's sentence survives scrutiny even under the more stringent standards of our state Constitution. A fortiori, Lewis's sentence does not violate the federal constitutional proscription against cruel and unusual punishment.

c. State Constitution

We evaluate a defendant's claim that his or her sentence constitutes cruel and/or unusual punishment under the state Constitution using the three-pronged analysis set forth in *People v. Dillon* (1983) 34 Cal.3d 441, 477-478 and *In re Lynch* (1972) 8 Cal.3d 410, 423-424.

The first prong involves the nature of the offense and the offender. (*In re Lynch, supra,* 8 Cal.3d 410, 425.) Lewis's probation report shows that he was born in 1979. His criminal career began with a conviction of first degree burglary in 1997; that conviction was his first strike. Thereafter, he suffered a misdemeanor conviction for petty theft with priors in 1998, a felony conviction for petty theft with priors in 1999, felony convictions for possession of controlled substances in 1998 and 1999, and a felony conviction for first degree burglary in 2000 (his second strike conviction). His probation was revoked in 2001, and he was on parole when he committed the present offense.

Defendant's conduct during the present offense shows cruelty and callousness -- evidence at trial indicated that Lewis took the lead in the robbery, held a gun to Pacheco's face, made him lie down, and held him down with his foot while the others removed property. Moreover, defendant's numerous convictions demonstrate that he has not reformed.

Recidivist punishment is based not merely on the defendant's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. (*Rummel v. Estelle* (1980) 445

U.S. 263, 284-285 [100 S.Ct. 1133, 63 L.Ed.2d 382].) Thus, the circumstances of the defendant and his crime support the severity of the punishment he received.

The second prong of the *Dillon/Lynch* analysis compares the defendant's punishment with punishment for other serious crimes in California. Lewis notes that for a first degree murder without special circumstances, he would have received only 25 years to life. However, Lewis's 40-year-to-life sentence was not imposed simply for the present robbery, during which he used a firearm, violence, and threats, but also for his recidivism. Severe recidivist punishment is proper even if the current offense is not violent. (See *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337-1338.)

Finally, applying the third prong of the *Dillon/Lynch* analysis, we observe that the harshness of punishment imposed under California's Three Strikes law, as compared to other states' recidivist statutes, does not automatically render it cruel or unusual. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433.) Ultimately, we cannot say defendant's punishment is so disproportionate "that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra,* 8 Cal.3d 410, 424, fn. omitted.) Especially, we cannot reach this conclusion after the United States Supreme Court's pronouncements in *Ewing* and *Andrade* that the Three Strikes law does not violate the Eighth Amendment's prohibition against cruel and unusual punishments. This court has upheld long sentences without exception when the defendant has committed a violent felony with at least two prior serious or violent felonies. Therefore, unless the Legislature of this state amends the statute or the high courts of this state or nation finds

the statutory scheme constitutionally defective, this court will continue to apply the law and affirm life sentences for recidivists.

As the law currently stands, defendant's 40-year-to-life sentence does not constitute cruel and unusual punishment under either the state or the federal Constitution.

B. Wiley's Contentions

1. Ineffective Assistance of Counsel

Wiley argues that he received ineffective assistance of counsel because his trial counsel failed to object to the admissibility of his confession. Detective James Beach interrogated Wiley, who was 17 at the time of the robbery, at the police station after his arrest; the interrogation was tape-recorded. Beach gave Wiley a *Miranda*[1] admonition, and Wiley expressly waived his *Miranda* rights and agreed to talk.

Wiley stated that he had arrived at the house on Blackstone only minutes before the police arrived; he had gone there to buy pit bulls. Beach told Wiley that he had been charged with armed robbery, and Wiley denied having anything to do with the crime.

Beach told Wiley that they had him "on video"; they had the clothes he had been wearing; and they had recovered all the property from the robbery. Beach then said that there "might be something that you want to talk to me about" because Wiley was "in trouble now," "nobody got hurt," and Wiley "might wanna tell me about what happened." Wiley responded, "All I'm saying is like the cops said was we had [Unintelligible]. Nobody didn't have no gun. I didn't have no gun." Beach replied, "Well that's not true."

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

Wiley then stated, "Nobody seen me . . . nothing like that. . . [unintelligible]. I'm innocent that's what I know and I'm willing to take it to court. *I don't have nothing else to say, so* . . . ." Beach said, "You don't have anything else to say?", and Wiley replied, "*No sir.*" (Italics added.)

Beach nonetheless continued questioning Wiley and repeated that Wiley had been seen on video cameras at the store and that Wiley had no doubt left behind forensic evidence such as fingerprints that would link him to the robbery. After talking about Wiley's family, and how much trouble Wiley was in, Beach asked, "You're involved, right? Well are you involved or not?" Wiley finally admitted, "I was involved. Yeah, I was involved." Wiley stated he had been wearing a black hood, and some of the others carried firearms when they went entered the store. He had grabbed two speakers that he loaded into the group's car. He denied ever having done anything like that before.

Wiley contends that once he told Beach that he had nothing else to say, his subsequent confession was inadmissible because the detective violated his invocation of his right to remain silent. He further contends that his trial counsel provided ineffective assistance by failing to move to suppress the confession on that basis.

A defendant claiming ineffective assistance of counsel must prove both that counsel failed to perform with reasonable competence and that a reasonable probability exists that the defendant would have received a more favorable outcome absent the alleged deficiency in counsel's performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Lewis* (1990) 50 Cal.3d 262, 288.)

Under *Miranda*, if the suspect "'indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.'" (*People v. Farnam* (2002) 28 Cal.4th 107, 179-180 quoting *Miranda v. Arizona, supra,* 384 U.S. at pp. 473-474 [86 S. Ct. 1602], fn. omitted.) Thus, once a suspect requests that interrogation cease, that request "must be 'scrupulously honored' [citation]; the police may not attempt to circumvent the suspect's decision 'by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind.'" (*People v. Wash* (1993) 6 Cal.4th 215, 238, quoting *Michigan v. Mosley* (1975) 423 U.S. 96, 105-106 [96 S.Ct. 321, 327, 46 L.Ed.2d 313].)

Here, Wiley stated, "Nobody seen me . . . nothing like that . . . [unintelligible]. I'm innocent that's what I know and I'm willing to take it to court. *I don't have nothing else to say*, so . . . ." Officer Beach then said, "You don't have anything else to say?", and Wiley replied, "*No sir*." (Italics added.) Once Wiley indicated that he had nothing else to say, Beach was entitled to ask him further questions only to clarify whether Wiley intended to invoke his right to remain silent. (*People v. Johnson* (1993) 6 Cal.4th 1, 27.)

Relying on the principle that a defendant's invocation of his or her right to remain silent must be unequivocal before the police are required to stop questioning, the People

cite several cases to support their position that defendant's statements that he had nothing more to say did not necessarily amount to an invocation of his *Miranda* rights. (*People v. Musselwhite* (1998) 17 Cal.4th 1216; *People v. Jennings* (1988) 46 Cal.3d 963, 977-978, fn. omitted [affirming the trial court's finding that the defendant's statement that "'I'm not going to talk' . . . 'That's it. I shut up.'" reflected "only momentary frustration and animosity" toward one of the officers and was not an invocation of his right to remain silent]; *People v. Silva* (1988) 45 Cal.3d 604, 629 [affirming the trial court's finding that the defendant's statement that "'I really don't want to talk about that'" did not amount to an invocation of *Miranda* rights]; *People v. Davis* (1981) 29 Cal.3d 814, 823-824 [holding that the defendant's statement during a polygraph test that he did not want to answer a question was not an assertion of *Miranda* rights]; *In re Joe R.* (1980) 27 Cal.3d 496, 516 [affirming the trial court's finding that the defendant's statement, in context, that "'That's all I have to say'" or "'That's all I want to tell you,'" did not amount to an assertion of the right to remain silent].)

In each of those cases, however, a motion to suppress the defendant's confession had been made, and the trial court had made an express factual finding as to whether the defendant had invoked his *Miranda* rights. Citing *People v. Ashmus* (1991) 54 Cal.3d 932, the People assert that on appeal from the denial of a motion to suppress a confession, the appellate court reviews independently the trial court's determination whether the defendant effectively invoked his right to remain silent. (*Id.* at pp. 969-970.) The People thus suggest that we may listen to the tape recording of the interrogation and review the

transcript, both of which were introduced into evidence, and make that determination in this appeal even though no motion to suppress was made below.

However, in *People v. Waidla* (2000) 22 Cal.4th 690, the court articulated the appropriate standard of review for rulings on motions to suppress confessions: "An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law. [Citations.] As for each of the subordinate determinations, it employs the test appropriate thereto. That is to say, it examines independently the resolution of a pure question of law; it scrutinizes for substantial evidence the resolution of a pure question of fact; it examines independently the resolution of a mixed question of law and fact that is predominantly legal; and it scrutinizes for substantial evidence the resolution of a mixed question of law and fact that is predominantly factual. [Citation.]" (*Id.* at p. 730.)

In *Waidla*, the trial court had made an express finding that the defendant had initiated a conversation with a detective after previously having invoked his *Miranda* rights. The court stated, "The finding of 'initiation' in and of itself is 'reviewed for substantial evidence' as the resolution of a 'mixed question' of law and fact that is 'predominantly factual.' [Citation.] The finding of any underlying historical fact is itself reviewed for substantial evidence as the resolution of a pure question of fact. [Citation.]" (*People v. Waidla, supra,* 22 Cal.4th at p. 731.) Applying this standard, the court found that substantial evidence, including the testimony of the detective, supported the trial

court's determination that the defendant had spontaneously initiated a conversation with the detective. (*Id.* at pp. 731-732.)

Here, similarly, it is a mixed question of law and fact that is predominantly factual as to whether Wiley's statement was an invocation of his right to remain silent. It would be inappropriate for this court, rather than the trier of fact, to make a finding on the issue. Thus, all the cases on which the People rely are distinguishable.

We conclude that there is a reasonable probability that the trial court would have granted a motion to suppress the confession had such a motion been brought. On their face, Wiley's statements could reasonably be found to constitute an invocation of his right to remain silent.

We can conceive of no reasonable tactical or strategic purpose for failing to bring a motion to suppress the confession. Moreover, the failure to move to suppress the confession was prejudicial -- the People do not even argue harmless error or lack of prejudice. Although the prosecutor argued that other evidence supported Wiley's guilt (Wiley's presence at the house where the stolen property was found shortly after the robbery, and the fact that Wiley had taken off his jacket), the confession was the bulk of the evidence against Wiley, as the prosecutor argued at trial. Notably, the jury hung with respect to a third defendant, Gibson, who was tried with Wiley and Lewis on evidence that was even stronger than that presented against Wiley if Wiley's confession were excluded, in that Deputy Quiroz identified Gibson, but not Wiley, as one of the men the deputy had seen running shortly after the robbery. We conclude that Wiley has established ineffective assistance of counsel, and his conviction must be reversed.

However, we are of the opinion that remand is appropriate to allow the trial court to conduct a hearing on the admissibility of Wiley's confession. If the trial court finds that Wiley did not invoke his right to remain silent, and the confession is admissible under the standards discussed above, the trial court is directed to reinstate the robbery conviction and sentence. If, however, the trial court finds that the confession is not admissible, the reversal will stand.

2. Enhancement

The People concede that Wiley correctly asserts that section 12022, subdivision (d)'s reference to subdivision (c) and its listing of crimes for which an enhancement may be imposed does not include the crime of robbery, and the one-year firearm enhancement must be stricken.

IV. DISPOSITION

Wiley's conviction is reversed, and the matter is remanded for a hearing on the admissibility of Wiley's confession. If the trial court finds that the confession is admissible, the trial court is directed to reinstate the judgment, except that the one-year gun enhancement shall be stricken. If the trial court determines that the confession is inadmissible, the judgment shall stand reversed.

Lewis's conviction is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

WARD
J.